IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1501

JAMES JEFFERSON McLAIN, ET AL.,
Petitioners,

versus

REAL ESTATE BOARD OF
NEW ORLEANS, INC., ET AL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioner James Jefferson McLain, et al pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in the above entitled case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 583 F. 2d 1315 and is reprinted in the Appendix hereto

pp. 24a-42a *infra*. The opinion of the District Court for the Eastern District of Louisiana is reported at 432 F. Supp. 982 and is reprinted in the Appendix pp. 17a-23a *infra*. (hereinafter referred to as "App")

JURISDICTION

The judgment of the Court of Appeals was rendered on November 15, 1978. Thereafter, a timely petition for panel rehearing was denied on December 15, 1978. (App. pp. 42a-43a). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1). The basis of jurisdiction in the District Court was 15 U.S.C. §§ 1, 15 and 26.

QUESTIONS PRESENTED

1. Whether a fixed commission equal to six percent of the purchase price of the home charged by all real estate brokers within the Greater New Orleans area on sales of residential real property is a price fix subject to control under federal anti-trust laws.

2. Whether the six percent fixed commission for real estate brokerage services charged by New Orleans area realtors on transactions involving residential real property has a "substantial effect" upon the interstate commerce aspects of such land transactions, to-wit: the interstate movement of home mortgage funds, and the procurement of property title insurance from out of state sources.

3. Whether buyers and sellers of homes in the Greater New Orleans area, and by implication, throughout the United States, should have the advantage of fee-price competition as a factor in determining their choice of a real estate agent.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Article I § 8 of the Constitution of the United States provides in pertinent part that:

> The Congress shall have Power
>
> . . . .
>
> to regulate commerce with Foreign Nations, and among the several States, and with the Indian Tribes;
>
> . . . .

B. 15 U.S.C. § 1 provides in pertinent part that:

> Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations, is declared to be illegal.

C. 15 U.S.C. § 15 provides that:

> Any person who shall be injured in his business or property by reason of anything for-

bidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of this suit including a reasonable attorney's fee.

D. 15 U.S.C. § 26 provides in pertinent part that:

Any person . . . shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws.

E. 28 U.S.C. § 1254 (1) provides that:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . .

STATEMENT OF THE CASE

This private anti-trust action for treble damages and injunctive relief was brought on behalf of the named

plaintiffs and the class they represent consisting of buyers and sellers of residential real property in New Orleans and its adjacent suburbs.

The suit was filed in October 1975 in the United States District Court for the Eastern District of Louisiana. Made defendants were two New Orleans area real estate associations, several named real estate firms and individual realtors and a class of defendant realtors doing business in New Orleans and nearby Jefferson Parish.

Numerous anti-competitive activities on the part of the realtors and their associations are alleged. (the entire complaint is reprinted for the Court's reference at App. pp. 1a-16a). The principal contention of the plaintiffs, however, is that the standard commission, six percent of the purchase price of the home, charged by realtors as their fee for services is a price fix violative of federal anti-trust laws.

In the trial court, defendants, at the outset, challenged the existence of subject matter jurisdiction alleging that their services are wholly local in nature and are neither "in interstate commerce" nor according to defendants, do their activities "affect interstate commerce" in any substantial way.

The realtors characterize their function simply as the bringing together of buyer and seller and little more. Their fee, they say, is earned when the purchase agree-

ment is signed; although as the District Court found, payment of the fee (the six percent) generally takes place at the time of the act of sale and is normally dependent upon the buyer's success in obtaining financing of the purchase, and, of course, is payable from the gross proceeds of the sale.

After an initial round of briefing of the jurisdictional issue, the trial court ordered discovery to be carried out to see:

> whether a substantial volume of interstate commerce is involved in the over-all real estate transaction, and
>
> whether the challenged activity is an essential, integral part of the transaction and inseparable from its interstate aspects.[1]

It was fairly well established that there is a substantial volume of interstate commerce involved in the over-all real estate transaction, via the procurement of home mortgage funds from out of state sources; the activities of federal agencies such as the Veterans Administration, the Federal Housing Administration and the Department of Housing and Urban Development through their various loan guarantee and subsidy programs, and finally, through the procurement of

1 This language taken from the district court opinion, 432 F. Supp. 982 (App. pp. 20a-21a) is virtually the same as the language of the lower court's minute entry of September 3, 1976 in which the discovery was ordered.

property title insurance from sources outside the State of Louisiana.

In this respect, the situation in the New Orleans area does not appear to vary greatly from that in Fairfax County Virginia, scene of *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). New Orleans is probably typical in this respect of most urban and suburban real estate markets in the country.

Plaintiffs, however, failed to establish that the challenged activity (brokerage service) is an "essential integral part of the transaction inseparable from its interstate aspects", and on that basis the case was dismissed.[2] On appeal to the United States Court of Appeals to the Fifth Circuit, the dismissal was affirmed.

REASONS FOR GRANTING THE WRIT

I. The decision below conflicts with this Court's decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975)

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) was a major decision of this Court. It invalidated a one percent minimum fee charged by lawyers in Fairfax County Virginia for title searches in residential real estate transactions. In *Goldfarb*, the minimum fee and its en-

2 Class certification had been deferred pending the disposition of the jurisdictional issue, hence the classes were never certified.

forcement mechanism were declared to be a price fix, violative of federal anti-trust law.

Of great significance is the fact that *Goldfarb* in addition to providing major impetus for the abolition of mandatory minimum fee schedules for lawyers throughout the country, is also the first decision of this Court to recognize and declare that transactions in land, the most local commodity, have interstate commerce aspects, and to hold that when the relevant streams of interstate commerce are sufficiently (substantially) affected, purely local anti-competitive activities become subject to the anti-trust jurisdiction of the federal courts. In short, what *Goldfarb* said about land transactions, may ultimately turn out to be of far greater importance than what it said about legal services or even about anti-trust law.

Petitioners suggest, and will attempt to show, that in *Goldfarb*, this Court marked one boundary of an entirely new area of anti-trust jurisdiction to wit: the residential real estate market.

It is no news, that the scope of federal court jurisdiction under the Sherman and Clayton Acts is ultimately what this Court says that it is. The development of anti-trust jurisprudence in this court is marked by a process of re-definition to meet changing economic realities.

In the first anti-trust case, *United States v. E. C. Knight*, 156 U.S. 1 (1895), this court held that the production of

sugar, as opposed to its interstate distribution, was not subject to the anti-trust laws. Sixteen years later *Knight* was dealt a disabling blow by this Court in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). By 1948 this Court had decided *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948) and the principle known as the "affectation doctrine" was recognized. The sharp dividing line between intrastate and interstate commerce for purposes of the acts was declared to be "functionally artificial" and of "slight importance if an adverse affect on interstate commerce follows." 334 U.S. 219, 220, 222 (1948).

In 1950 this Court unanimously decided the case of *United States v. National Association of Real Estate Boards*, 339 U.S. 485 (1950). In that opinion, Mr. Justice Douglas, immediately after stating the case, which, like the present case, alleged price fixing by realtors in setting standard commissions for their services, remarks that no interstate commerce is involved. Since the relevant market was the District of Columbia, no interstate commerce connection was necessary to support Sherman jurisdiction, and the remark is pure dicta. Nevertheless, twenty-five years later, in *Goldfarb*, the Chief Justice, speaking for a unanimous court, including Justice Douglas, recognized no less than two streams of interstate commerce that are involved in land transactions:

1. the interstate flow of home mortgage funds, and

2. the out of state procurement of land title insurance

(*Goldfarb v. Virginia State Bar*, 421 U.S. 773, 783)

Having defined the streams of commerce, in *Goldfarb* a conventional application of the affectation doctrine may be used to determine whether local conduct is subject to federal anti-trust control.

Goldfarb found a substantial effect upon commerce arising from the legal services in question based upon the relationship between a title search and a valid lien on the title to secure the financing of the purchase price. (*Id.*)

Unfortunately, the defendants, and both lower courts seized upon the specific analysis applied to the legal services in their relation to interstate commerce and applied the same exact analysis to the relation between brokerage services and interstate commerce in land transactions.

Petitioners respectfully suggest that this mechanical application is far too restrictive and overlooks the principle that lies at the very heart of the affectation of commerce doctrine, to-wit: that there must be "close scrutiny" of the particular facts of each situation. [*Cf: Santa Cruz Co. v. Labor Board*, 303 U.S. 453, 466-68 (1938).]

Simply because the services of a real estate broker are not absolutely necessary to assure "a lien on a valid title of the borrower," as the legal services were in *Goldfarb* (Cf. 421 U.S. 773, 784) does not mean that a combination to fix commissions for realtors has no substantial effect upon the interstate commerce aspects of land transactions in which realtors are involved. (Realtors play a part in an overwhelming majority of private home sales).

Ordinarily the role played by the realtor in the buy-sell transaction includes the following activities:

1) obtaining a listing from a potential seller;
2) locating a potential buyer from multiple listing services, advertising, national relocation services, etc.;
3) confecting a purchase agreement, usually contingent upon the buyer obtaining financing (a stream of interstate commerce) and title insurance (another stream of commerce);
4) often acting as escrow agent for the earnest money deposit;
5) often providing assistance and logistical support in moving the transaction toward the act of sale (*eg:* obtaining appraisals, acting as liaison between the parties, the homestead, the lawyers, etc.);

6) attending the act of sale;

7) accounting for deposits held in escrow, and

8) collecting at the act of sale a *vested* commission equal to six percent of the purchase price.

Petitioners admit that a real estate transaction can take place without a realtor being involved. Nevertheless given the complexity of a credit transaction in immovable property, the relative lack of sophistication of most consumers in the residential housing market, and the large sums of money involved, the services of a professional real estate broker are a practical if not a technical necessity.

In *Swift and Co. v. United States*, 196 U.S. 375, 398, this Court said, "commerce among the states is not a technical legal concept, but a practical one drawn from the course of business."

But that's not all.

The most substantial effect which the presence of a realtor exerts upon the transaction is his fee. The fixed commission, is an artificially inflated component — or at the very least a non-competitive element — of the purchase price of the house. As a matter of logic and common sense, either the seller adjusts the price to absorb the commission, or he must take less. Presuming

he decides to adjust the price, the buyer then must pay more for the house. What could exert a more direct affect upon such things as the amount of financing and the extent of the title insurance than a fixed non-competitive element of the price? In a strict, practical sense, the cost of the home is either going to be six percent higher, as a result of the realtor's participation, or else the seller will have to settle for less money.

The buyer who pays more is affected even worse. Since the realtor's commission comes "off the top" at the act of sale, the buyer must finance (through largely interstate sources) more of the purchase price; also, the VA, FHA or HUD must underwrite a larger loan than would be the case if there were no realtors and no commissions. What's more, this simple and logical observation has an almost startling mathematical and financial consequence.

It is a matter of absolute fact, albeit complicated arithmetic that given a standard 30 year home loan at a not uncommon 9½% *per annum* interest, for every dollar borrowed *three* dollars are repaid. Thus in amortizing the six percent commission, the buyer will eventually repay, over the life of the loan, an amount equal to roughly 18% of the original purchase price of his home.

One could argue that as opposed to financing the extra six percent, the buyer could simply make a larger down payment, but as a practical matter, the buyer is probably going to pay as much money on the down pay-

ment as he can afford, and since that down payment will ordinarily be the source of the realtor's commission it seems obvious that were the price of the house 6 percent less (assuming no realtor), the buyer would obtain an additional six percent equity in his new home by virtue of his original down payment. It is therefore reasonable to conclude that the artificial and non-competitive inflation of the purchase price of the home brought about by the realtor's commission is reflected in the amount financed through the lending institution. A similar argument can be made that since title insurance premiums are based upon purchase price, an artificial increase in such price, artificially inflates title insurance premiums. The same can be said about premiums, for fire and extended coverage, general liability (homeowner's coverage), and credit life insurance, all of which are generally procured through interstate sources.

Plaintiff submits that the following is clear:

1. The relationship between legal services and the interstate aspects of the land transaction is different from the relationship of brokerage services to such interstate aspects, therefore,
2. The mechanical attempt to apply *Goldfarb* by direct analogy is not necessary, and
3. A non-competitive element which artificially increases the price of homes can exert a substantial effect upon interstate commerce aspects of real estate transactions, and
4. *Goldfarb*, like most modern antitrust jurisprudence, requires nothing more than that a substantial effect be shown in order for jurisdiction to exist

Petitioners submit that the courts below erred in assuming that the exact analysis by which this Court found jurisdiction in *Goldfarb* is the only manner in which jurisdiction can be found.

II. This Court should grant writs to resolve the numerous conflicting decisions in the trial and appellate courts throughout the country and provide a definitive decision in this area.

The following cases all involved the question of antitrust jurisdiction over activities of realtors:

I. Jurisdiction found

A. *Sapp v. Jacobs*, 547 F.2d 1170 (7th Cir.) rev'g 408 F. Supp. 119 (S.D., Ill., 1977)

B. *Oglesby and Barclift, Inc., v. Metro MLS, Inc.*, CCH Trade Cases, paragraph 61,064 (E.D., Va., 1976)

C. *United States v. Atlanta Real Estate Board*, 1972 Trade Reg. Rep., paragraph 73,825 (N.D., Ga. 1971)

D. *United States v. Jack Foley Realty, Inc.*, 1977 Trade Reg. Rep., paragraph 61,678 (D. Md. 1977)

E. *Gateway Assoc., Inc. v. Essex-Costello, Inc.*, 380 F. Supp. 1089 (N.D., Ill. 1974)

F. *Mazur v. Behrens* (1974-1) Trade Reg. Rep., paragraph 75,070 (N.D., Ill. 1972)

G. *Knowles v. Tuscaloosa Bd. of Realty, Inc.*, (unreported) No. 75-P-591 (N.D. Ala., 1975)

H. *Wiles v. Tampa Board of Realty, Inc.*, (unreported) No. 74-136 Cir. T-K (N.D., Fla)

I. *United States v. Long Island Bd. of Realtors, Inc.*, CCH Trade Cases, paragraph 74,068 (E.D. NY, 1972)

II. Jurisdiction declined

A. *Manion v. Jefferson Bd. of Realty*, (unreported) No. 73-2604 (E.D. La. 1974) Aff'd No. 74-1901 (5th Cir., 1975)

B. *Income Realty and Mortgage, Inc., v. Denver Bd. of Realtors*, 578 F.2d 1326 (10th Cir. 1978)

C. *Bryan v. Stillwater Bd. of Realtors*, 578 F.2d 1319 (10th Cir. 1977)

D. *Marston v. Ann Arbor Property Mgt. Ass'n.*, 302 F. Supp. 1276 (E.D., Mich. 1969), aff'd 422 F.2d 836 (6th Cir., 1970)

E. *Cotillion Club, Inc., v. Detroit Real Estate Bd.*, 303 F. Supp. 502 (E.D. Mich., 1964)

F. *Hill v. Art Rice Realty*, 66 F.R.D. 449, 511 (N.D. Ala. 1974), *aff'd* 511 F.2d 1400 (5th Cir., 1975)

G. The instant case.

Although most of the cases are from district courts, affirmances and reversals with or without opinion have created a conflict between the fifth, sixth and tenth circuits on the one hand (finding no jurisdiction) and the seventh circuit whose reversal and remand of *Sapp v. Jacobs*, 547 F.2d 1170 (7th Cir.) unfortunately without opinion was followed by a *denial* of certiorari in this Court [See: 431 U.S. 968 (1977).]

It is very apparent that this is a lively issue which requires the sort of clarification only a decision by this Court can bring.

III. The question of whether consumers in the residential real estate market should have the advantages of price competition as a factor in their selection of a real estate agent is an important matter of anti-trust policy worthy of a decision by this Court.

Petitioners have previously mentioned that *Goldfarb* has significance in what this Court said about mandatory minimum fees for lawyers. But to extend the awesome power of the antitrust laws, into a brand new area (land transactions) and to reach only the activities of title lawyers whose minimum fee schedules were rarely enforced, by their professional associations would seem equivalent to driving a thumb tack with a sledge hammer.

Surely the Court perceives a far more severe restraint of trade involving the activities of realtors in the residential real property market. The existence of conflicting constructions of the intent of this Court in *Goldfarb* is itself an indication of the need for a determination of the issue of price competition among realtors.

Sales of homes nationally involve billions of dollars annually. Each year, millions of buyers and sellers enter the market. Societal mobility finds millions of families relocating every few years as jobs change and people transfer and are re-assigned. Despite the local nature of land, the market is national in scope.

A directive to all lower federal courts, either to regulate competition among realtors, or to ignore the lack of it is a matter worthy of the attention of this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted:
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of March 1979 three copies of the Petition for Writ of Certiorari were hand delivered by undersigned counsel to Harry McCall, Jr., Esq., Chaffe, McCall, Phillips, Toler and Sarpy, 1500 1st National Bank of Commerce Building, New Orleans, Louisiana 70112, lead counsel for respondents. I further certify that all parties required to be served have been served.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

JAMES JEFFERSON McLAIN, DOUGLAS ARTHUR NETTLETON, JR., RAYMOND JOSEPH MUNNA, IRVING HIRSCH KOCH, and all other parties similarly situated,

Plaintiffs,

versus CA No. 75-3402

REAL ESTATE BOARD OF NEW ORLEANS, INC., JEFFERSON BOARD OF REALTORS, INC., GERTRUDE GARDNER, INC., LATTER AND BLUM, INC., WAGUESPACK AND PRATT, INC., STAN WEBER AND ASSOCIATES, INC., SANDRA, INC., ISABELLE McLEOD d/b/a ISABELLE C. McLEOD, REALTORS, and all other parties similarly situated,

Defendants.

COMPLAINT FOR INJUNCTIVE RELIEF
AND TREBLE DAMAGES UNDER THE
ANTI TRUST LAWS — CLASS ACTION

I

JURISDICTION

This complaint is filed and this action is instituted under Section 1 of the Act of Congress of July 2, 1890,

15 U.S.C. Section 1, as amended and supplemented, commonly known as the Sherman Act, and Section 4 and 16 of the Act of Congress of October 15, 1911, 15 U.S.C. Section 15 and 26, as amended and supplemented, commonly known as the Clayton Act. Exclusive jurisdiction is conferred pursuant to 15 U.S.C. Section 26.

II

The purposes of this action are (a) to recover treble money damages against defendants for injuring the business and property of plaintiffs and the class of persons they represent. Plaintiffs seek to represent buyers and sellers of single family and multiple family residences; which injury proximately resulted from defendants' violation of the anti trust laws of the United States; and (b) to restrain and enjoin defendants from continuing the illegal monopoly and the combinations, conspiracies and contracts in restraint of trade in commerce to the injury of the plaintiffs and the class of persons which they represent.

III

The defendants maintain offices, transact business and are each found within the Eastern District of Louisiana.

IV

PLAINTIFFS

1. Plaintiff, James Jefferson McLain, a resident of Orleans Parish, Louisiana, purchased a single family

residence in Orleans Parish on or about August 17, 1972. Defendants provided real estate brokerage service in that transaction.

2. Plaintiff, Douglas Arthur Nettleton, Jr., a resident of Orleans Parish, Louisiana, purchased a single family residence in Orleans Parish on or about March, 1974. Defendants provided real estate brokerage service in that transaction.

3. Plaintiff, Irving Hirsch Koch, a resident of Orleans Parish, Louisiana, sold a single family residence in Orleans Parish on or about April, 1973. Defendants provided real estate brokerage service in that transaction. Plaintiff, Irving Hirsch Koch purchased a single family residence in Orleans Parish on or about September 1, 1974. Defendants provided real estate brokerage service in that transaction.

4. Plaintiff, Raymond Joseph Munna, a resident of Jefferson Parish, Louisiana, purchased a multifamily residence in Jefferson Parish, Louisiana on or about August 18, 1975. Defendants provided real estate brokerage service in that transaction.

V

CLASS ACTION ALLEGATIONS

Individual plaintiffs bring this action for damages on their own behalf and, pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, on behalf of all

similarly situated buyers and sellers of single and multiple family residences in Orleans and Jefferson Parishes, a class consisting of at least one thousand (1000) members. (a) The class is so numerous that joinder of all members is impracticable; (b) there are questions of law or fact common to the class; these questions predominate over any questions affecting only individual members; (c) the claims of plaintiffs are typical of the class; (d) plaintiffs will fairly and adequately protect the interest of the class; (e) the parties opposing the class have acted or refused to act on grounds generally applicable to the class, thereby making appropriate declaratory and injunctive relief with respect to the class as a whole; (f) a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

VI

DEFENDANTS

On information and belief, the Real Estate Board of New Orleans, Inc., (hereafter referred to as Orleans Board) is a corporation organized and existing under the laws of the State of Louisiana. It maintains offices and transacts business in the Eastern District of Louisiana. The Orleans Board is an association of licensed real estate brokers and provides certain services, trade marks, real estate computer facilities, and multiple listing facilities for its members. On information and belief, the Orleans Board is a member of Realtron, Inc. Licensed real estate brokers must belong to

one of the voluntary member associations of the National Association of Real Estate Boards, Inc., and of Realtron, Inc., in order to gain access to these services. On information and belief, the Orleans Board has certain rules and regulations and recommended practices.

VII

On information and belief, the Jefferson Board of Realtors (hereafter referred to as Jefferson Board) is a corporation organized and existing under the laws of the State of Louisiana. The Jefferson Board maintains offices and transacts business in the Eastern District of Louisiana. The Jefferson Board is a voluntary membership organization consisting of licensed real estate brokers from the State of Louisiana. On information and belief, the Jefferson Board provided certain services for its members which are unavailable to non members.

VIII

On information and belief:

(a) Defendant Gertrude Gardner, Inc., is a corporation organized in the State of Louisiana and domiciled in the Eastern District. Defendant Gertrude Gardner, Inc., acting through its duly authorized agents, provided real estate services to plaintiffs, including a brokerage fee.

(b) Latter and Blum, Inc., is a corporation organized

in the State of Louisiana and domiciled in the Eastern District. Defendant Latter and Blum, Inc., acting through its duly authorized agents, provided real estate brokerage services to plaintiffs, including a brokerage fee.

(c) Defendant Waguespack and Pratt, Inc., on information and belief, is a corporation organized under the laws of the State of Louisiana and domiciled in the Eastern District. Defendant Waguespack and Pratt, Inc., acting through its duly authorized agents, provided real estate brokerage services to plaintiffs, including a brokerage fee.

(d) Defendant Stan Weber and Associates, Inc., on information and belief, is a corporation organized under the laws of the State of Louisiana and domiciled in the Eastern District. Defendant Stan Weber and Associates, Inc., acting through its duly authorized agents, provided real estate brokerage service to plaintiffs, including a brokerage fee.

(e) Defendant Sandra, Inc., on information and belief, is a corporation organized under the laws of the State of Louisiana and domiciled in the Eastern District. Defendant Sandra, Inc., acting through its duly authorized agents, provided real estate brokerage services to plaintiffs, including a brokerage fee.

(f) Isabelle McLeod, Realtor d/b/a Isabelle C. McLeod Realtors, on information and belief, a sole proprietorship transacting business in the Eastern District of Louisiana. Defendant Isabelle C. McLeod Realtors, acting through its duly authorized agents, provided real estate brokerage services to plaintiffs, including a brokerage fee.

(g) All Brokers who are Realtors and who transacted business in the Eastern District of Louisiana, including but not limited to members and associate members of the Orleans and Jefferson Board, and who were realtors at any time between the dates of October 31, 1971 and October 31, 1975; who on information and belief, have provided real estate brokerage services, including a brokerage fee.

IX

CLASS ACTION ALLEGATIONS

Pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, defendants represent the class of all realtors in Orleans and Jefferson Parish who at any time during the period from October 31, 1971 to October 31, 1975, were members of the Orleans Board and Jefferson Board; a class consisting of at least three hundred (300) members. (a) The class is so numerous that joinder of all members is impracticable; (b) there are questions of law and fact common to the class, and these questions predominate over any questions affecting individual members; (c) the defenses of the representative parties are typical of the defenses of the class; (d) the representative parties will fairly and ade-

quately protect the interests of the class; and (e) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

X

CO-CONSPIRATORS

Real estate brokers duly licensed to transact business in Orleans and Jefferson Parishes (who are not members of the Orleans and Jefferson Boards) on information and belief engage in the practices described herein but are named as co-conspirators.

XI

THE NATURE OF TRADE AND COMMERCE

The activities of the defendants are within the flow of interstate commerce and have an effect upon that commerce.

XII

Defendants account for a substantial proportion of real estate brokering services performed in connection with the purchase and sale of real estate in Greater New Orleans. Defendants assist in the purchase and sale of thousands of parcels of real estate in Greater New Orleans each year. Persons purchasing real estate in the Greater New Orleans area utilize the services of defendants in the purchase and sale of real estate.

XIII

Many persons using the services of the defendants in connection with the purchase and sale of real estate are persons moving into and out of the Greater New Orleans area.

XIV

Defendants assist their clients in securing financing and insurance involved with the purchase of real estate in the Greater New Orleans area. Such financing and insurance are obtained from sources outside the State of Louisiana and move in interstate commerce into the State of Louisiana through the activities of the defendants.

XV

OFFENSE

Defendants have violated Section 1 of the Sherman Act and continue to engage in an unlawful combination and conspiracy to restrain interstate trade and commerce in the offering for sale and sale of real estate brokering services. Such unlawful combination and conspiracy are continuing and will continue unless this Court grants relief.

XVI

The aforesaid combination and conspiracy consist of a continuing agreement and concert of action between the defendants to fix, control, raise, and stabilize prices

for the purchase and sale of real estate in a knowing, arbitrary, unreasonable and unlawful way.

XVII

In order to effect aforesaid combination and conspiracy the defendants have committed certain overt acts in furtherance of this combination and conspiracy:

(a) Engage in and encourage exchange of price information and fixed commission structures under the guise of associational meetings, educational formats, conventions, and trade publications.

(b) Share in, exchange, and artificially maintain fixed commissions and artificially-raised prices through trade usage, custom and patterns evidenced by multiple listing services and widespread fee splitting.

(c) Systematically withhold, suppress, and repress from buyers and sellers of real estate, including, by way of example:

(i) prices of competitive and comparable housing;

(ii) features and amenities of comparable housing;

(d) Promote and engage in fixed commissions for the purchase and sale of real estate.

(e) Publish and disseminate printed matter which discourages price competition and restrains trade.

(f) Telephone and otherwise contact one another between meetings and discuss price fixing.

XVII

EFFECTS ON PLAINTIFFS

The aforesaid combination and conspiracy have the following effects, among others, on the individual plaintiffs and the class which they represent:

(a) Fees and commissions charged for real estate brokerage services have been raised, fixed, and maintained at an artificial and non competitive level;

(b) Prices of homes and multifamily residences have been artificially raised to buyers;

(c) Proceeds to sellers have been artificially reduced.

Plaintiffs and the class they represent have suffered and continue to suffer injury to their business and property.

XVIV

DAMAGES

As a consequence of the unlawful acts of the defendants, alleged above, the individual plaintiffs and the

class they represent have been injured in their business and property in the approximate amount of at least Sixty Million and No/100 ($60,000,000.00) Dollars as of the date of filing of this complaint and are entitled under 15 U.S.C.A. Section 15 to treble damages of One Hundred Eighty Million and No/100 ($180,000,000.00) Dollars.

XV

All plaintiffs and the class they represent continue to incur injury to their business and property for as long as defendants persist in their unlawful conduct and are entitled under 15 U.S.C. Section 26 to injunctive relief against continued loss to property and business through defendants' persistence of the conspiracy under 15 U.S.C. Section 1.

WHEREFORE, plaintiffs pray:

1. That the Court adjudge and decree that the defendants have engaged in an unlawful combination and conspiracy in restraint of the aforesaid trade and commerce in the sale of real estate brokering services in the State of Louisiana in violation of Section 1 of the Sherman Act.

2. That the defendants be enjoined and restrained from, in any manner, directly or indirectly, continuing, maintaining, or renewing the combination and conspiracy alleged above, or from engaging in any

other combination, conspiracy, contract, agreement, understanding, or concert of action having a similar purpose or effect, and from adopting or following any practice, plan, program, or device having a similar purpose or effect.

3. That the defendants be enjoined from agreeing to adhere to any schedule or percentage rates artifically restraining trade in the performance of real estate brokering services in the State of Louisiana.

4. That judgment be entered in favor of the individual plaintiffs and the class they represent and against defendants in a sum equal to treble the amount of damages suffered by said plaintiffs and the class they represent by reason of violations of the law herein complained of, together with the cost of this suit and reasonable attorneys fees; and

5. That plaintiffs have such further relief as the Court may deem to be just and proper.

Respectfully submitted,
NELSON, NELSON, and
LOMBARD, LTD.
A Professional Law
Corporation
344 Camp Street, Suite 1100
New Orleans, La. 70130
Phone: 523-5893

/s/ JOHN P. NELSON, JR.
John P. Nelson, Jr.
Trial Attorney
/s/ PATRICIA SAIK
Patricia Saik
Trial Attorney
/s/ RAYMOND JOSEPH MUNNA
Raymond Joseph Munna

VERIFICATION

We, the undersigned, do hereby certify that we are the named plaintiffs in the cause entitled James Jefferson McLain, et al. vs. Real Estate Board of New Orleans, Inc., et al., who being duly deposed and sworn, do say that to our best knowledge and belief, the allegations therein stated are true and correct.

/s/ JAMES JEFFERSON McLAIN
James Jefferson McLain
/s/ DOUGLAS ARTHUR NETTLETON, JR.
Douglas Arthur Nettleton, Jr.
/s/ RAYMOND JOSEPH MUNNA
Raymond Joseph Munna
/s/ IRVING HIRSCH KOCH
Irving Hirsch Koch

WITNESSES:

/s/ LOLITA BAHAM
/s/ SHIRLEY LOVE

Sworn to and subscribed before me,
this 30 day of October 1975.

/s/ JOHN P. NEHN, JR.
Notary Public

PLEASE SERVE:

Waguespack, Pratt, Inc.,
through its registered agent:
F. Waguespack, Jr.
812 Perdido Street
New Orleans, La. 70112

Gertrude Gardner, Inc.,
through its registered agent:
Gertrude Gardner
7934 Maple Street
New Orleans, La. 70118

Stan Weber and Associates, Inc.,
through its registered agent:
Stanley J. Weber, Jr.
3841 Veterans Blvd.
Metairie, La. 70002

Isabelle C. McLeod, Realtors,
through:
Isabelle C. McLeod
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New Orleans, La. 70118

Latter and Blum, Inc.,
through its registered agent:
Moise W. Dennery
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New Orleans, La. 70112

Sandra, Inc., Realty,
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Jefferson Board of Realtors, Inc.,
through its registered agent:
Charles J. Derbes, Jr.
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Kenner, La. 70062

Real Estate Board of New Orleans, Inc.,
through its registered agent:
Edouard Carrere
423 Carondelet Street
New Orleans, La. 70130

James Jefferson McLAIN et al.

versus

REAL ESTATE BOARD OF
NEW ORLEANS, INC., et al.

Civ. A. No. 75-3402.

United States District Court,
E. D. Louisiana.

May 31, 1977.

MEMORANDUM OPINION AND ORDER

BOYLE, District Judge.

This intended class action was brought on behalf of buyers and sellers of residential property in the New Orleans area who have used the services of real estate brokers. Plaintiffs allege that the defendant associations and realtors have conspired to fix and control the price of these services in violation of the Sherman Anti-Trust Act (15 U.S.C. §§ 1 *et seq.*). They seek declaratory and injunctive relief as well as the recovery of treble damages.

A motion to dismiss the action was filed by defendants on the ground the challenged brokerage activities are wholly intrastate in nature and, since they neither occur in nor substantially affect interstate commerce,

are beyond the ambit of federal anti-trust prohibition.[1] We took the matter under submission and now, having considered the memoranda of counsel and the relevant documents of record, we conclude defendants' motion must be granted and the action dismissed.

Plaintiffs raised several arguments in initially opposing the motion, but we found these groundless save for the contention that brokers in this area participate in securing the financing and insurance necessary to consummate the sale/purchase of real estate.[2] We reasoned that, to the extent the financing and insurance aspects of real estate transactions may be shown to be interstate in nature, defendants' practical nexus therewith might satisfy the jurisdictional requirement of the Sherman Act pursuant to the Supreme Court holding in *Goldfarb v. Virginia State Bar. See* 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975). Accordingly, the parties were advised in conference

1 It is axiomatic that, in order for a federal action to be cognizable under the Sherman Act, the challenged activity must either be in interstate commerce or else have a substantial effect thereupon. *See Battle v. Liberty National Life Insurance Co.*, 493 F.2d 39, 47 (5 Cir. 1974) and cases cited therein.

2 Plaintiffs had argued that many persons employing brokerage services are in the process of either moving into or out of the state, and that the alleged price-fixing activity by defendants is a *per se* Sherman Act violation which presumes that the jurisdictional requirement of the statute is satisfied. Yet, the mere interstate movement of a prospective buyer or seller — occurring either prior to or after the furnishing of brokerage services — hardly infuses such services with the requisite impact upon interstate commerce. Equally clear, in our view, is the fact that the *per se* rule of antitrust law relates solely to the merits of the claim and does not dispense with the threshold obligation of the claimant to establish subject matter jurisdiction.

that the issue at hand could be narrowed to the applicability of *Goldfarb*, and counsel were directed to engage in further discovery and submit additional memoranda addressed to this point. *See* Minute Entry of 9/3/76 [Record Doc. # 26].[3]

The *Goldfarb* case, like this one, involved allegations of price-fixing violative of the Sherman Act — there, through a minimum fee schedule prescribed by the defendant bar association and applied to legal services for title examinations relative to residential real estate transactions. The *Goldfarb* defendant likewise argued that since these legal services were performed intrastate and were essentially local in nature, they did not substantially affect interstate commerce within the

3 Considering the results of this discovery and the supplemental briefs of counsel in addition to the pre-existing record, we reiterate the view that it is only *via* the *Goldfarb* analysis that this action may be said to arise under the Sherman Act. Thus rejected is argument by plaintiffs in their final memorandum that brokerage activities take place in interstate commerce by dint of a "national relocation service" in which two defendant realtors apparently participate. The service essentially involves an exchange of lists of brokers between realtors in different states. A participating realtor in one state will furnish to a client wishing to buy property in another the name of a broker therein who appears on the list, and receives a "referral fee" upon consummation of the sale by the out-of-state broker.

What plaintiffs fail to show in this approach is that the brokerage activity *complained of herein* occurs in or substantially affects interstate commerce. We do not construe their complaint to allege price-fixing with regard to broker referral fees, but only with regard to the fees which arise out of realtors' services in connection with the purchase or sale of real estate in the New Orleans area. We disregard the separate and independent participation of a broker in referring clients to out-of-state sources, therefore, and focus upon the possible interstate commerce effects of the in-state transaction by which a broker regularly earns his commission.

meaning of the Sherman Anti-Trust Act. The Supreme Court disagreed, however, noting that the transactions which created the need for the legal services in question were themselves interstate in character. Not only did the purchases involve financing through a significant amount of out-of-state funds, but a significant number of the loans were guaranteed by out-of-state government agencies. The Court went on to find that

> [t]he necessary connection between the interstate transactions and . . . the minimum fee schedule is present because, in a practical sense, title examinations are necessary in real estate transactions to assure a lien on a valid title of the borrower . . . . Thus a title examination is an integral part of an interstate transaction . . . . Given the substantial volume of commerce involved, *and the inseparability of this particular legal service from the interstate aspects of real estate transactions* we conclude that interstate commerce has been sufficiently affected.
>
> [Emphasis added].

95 S.Ct. at 2011-12.

It is clear that any inquiry based upon this decision must be twofold: 1) whether a "substantial" volume of interstate commerce is involved in the overall real estate transaction, and 2) whether the challenged activity

is an essential, integral part of the transaction and inseparable from its interstate aspects. Yet in this case — even were it assumed *arguendo*, as plaintiffs purport to establish, that many title insurance companies issuing policies on local residential property are situated outside of Louisiana and, moreover, that the businesses providing the necessary financing in local real estate purchases extend across state lines — the second criterion of *Goldfarb* remains unsatisfied. Those real estate financing officials who were deposed consistently testified that, while brokers customarily contact mortgage companies to solicit financing information on behalf of clients and on occasion even transport clients to the company offices, the actual financing process involves only the lender and borrower and the brokerage service is in no way an integral aspect thereof. *See, e.g.*, Dep. of Edmond G. Miranne, at 23-26 [Record Doc. # 53]; Dep. of Julian O. Hecker, Jr., at 32, 36-37 [Record Doc. # 55]. Stan Weber, Chairman of the Board of one of the defendant companies, essentially corroborated this testimony, stating that brokers might be asked by purchasers about the best financing available, but "cannot assist someone to secure financing." *See* Dep. of Stan Weber, at 40 [Record Doc. # 61]. With regard to title insurance, it also appears through deposition testimony that the actual procurement process takes place between the insurer and lending institution/purchaser, the only contact between an insurer and broker being that the former does provide information concerning its services to various realtors.

See Dep. of James W. Mills, Jr., generally and at 15-16, 18 [Record Doc. # 58].[4]

Plaintiffs correctly observe that a broker's commission usually is earned only after the buyer has been successful in securing financing[5] and that, as a practical matter, title insurance is a precondition to execution of the loan. Nonetheless, the inescapable conclusion to be

4 In no way contradictory is the deposition testimony of two federal officials involved in the financing/insurance aspect of local real estate transactions. Angel Miranda, an area economist for the New Orleans office of the Department of Housing and Urban Development (HUD), testified as to various programs operative in this area whereby his agency, as well as the Fair Housing Administration (FHA), make mortgage insurance available to homebuyers; but he made no reference to broker activity in this connection. *See* Dep. of Angel Miranda [Record Doc. # 52]. Another HUD official, Meaher Turner, gave further testimony concerning these loan insurance programs, but spoke of brokers only to the extent their services have been used by HUD in the sale of repossessed property. *See* Dep. of Meaher P. Turner [Record Doc. # 59].

Moreover, counsel for both sides cite in their memoranda the deposition of Paul Greiner, a loan guaranty officer for the Veterans Administration (VA). The transcript of this particular testimony nowhere appears in the record. But it nevertheless is worth noting that the memorandum of plaintiffs' counsel confirms what defendants represent to have been Greiner's testimony, i.e., that real estate brokers play no role in the actual process during which the VA decides whether to guarantee a loan. *See* Plaintiffs' Supp. Memo in Opposition to Motion, at p. 11 [Record Doc. # 56]; Defendants' Third Supp. Memo in Support of Motion, at p. 7 [Record Doc. # 57].

5 An apparent discrepancy exists between this statement and that of affiant-brokers Max Derbes, Jr. and Dalton L. Truax, Jr. to the effect that brokers "earn their commissions upon procuring a purchaser or seller . . . ." *See* Affidavits of Max Derbes, Jr. and Dalton L. Truax, Jr., att'd to Defendants' Motion [Record Doc. # 14]. Regardless of the exact point in time at which the commission accrues, however, the critical inquiry remains whether the service for which a broker earns his commission entails the financing and/or insurance of the transaction.

drawn from the evidence is that the participation of the broker in these (presumably interstate) phases of the real estate transaction is an incidental rather than indispensable occurrence in the transactional chain of events. We regard as still unrefuted the sworn statements of two brokers — filed in conjunction with defendants' motion — to the effect that the brokerage function is limited to bringing buyer and seller together and is essentially completed at that time. *See* Affidavits of Max Derbes, Jr. and Dalton L. Truax, Jr., att'd to Defendants' Motion [Record Doc. # 14].[6] Jurisdiction on the basis of *Goldfarb* is not established herein, and, in light of our ruling as to the other theories of interstate commerce involvement urged by plaintiffs, a cause of action under the Sherman Anti-Trust Act has not been stated.

For the foregoing reasons, defendants' motion to dismiss should be, and it is hereby, GRANTED, dismissing plaintiffs' action with costs.[7]

6 In deposition testimony, Derbes clarified this reference to the brokerage function being "essentially" completed at the time a purchaser or seller is procured. In "many cases," he declared, the broker has done all he must do at this stage, although in some instances his continued assistance might be needed to "make sure everybody is performing the conditions of the contract." *See* Dep. of Max Derbes, Jr., at 58. As far as involvement in financing is concerned, however, Derbes emphatically denied that under the standard form agreement to purchase or sell a broker acquires the authority to obtain financing on behalf of his client. *See id.*, at 60-62.

7 To the extent matters beyond the pleadings have been called to the court's attention, the motion, albeit styled a motion to dismiss for failure to state a claim, may be treated as one for summary judgment. See Rule 12(b), F.R. Civ.Pro. In fact, the motion also might properly be viewed as one for dismissal for lack of subject matter jurisdiction. In any event, no genuine issue of material fact appears to preclude judgment in defendants' favor pursuant to Rule 56.

James Jefferson McLAIN et al.,
Plaintiffs-Appellants,

versus

REAL ESTATE POARD OF
NEW ORLEANS, INC., et al.,
Defendants-Appellees.

No. 77-2423

United States Court of Appeals,
Fifth Circuit.

Nov. 15, 1978.

Rehearing Denied Dec. 15, 1978.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GEWIN, GODBOLD and MORGAN, Circuit Judges.

LEWIS R. MORGAN, Circuit Judge:

This is an alleged class action brought on behalf of buyers and sellers of residential property in the New Orleans area. Claiming that the defendant realty associations and realtors have conspired to fix the prices of their services, the plaintiffs seek declaratory and injunctive relief as well as the recovery of treble damages.

In proceedings below, the defendants filed a motion to dismiss[1] asserting that the challenged brokerage activities were wholly intrastate in nature and thus fell beyond the reach of federal antitrust prohibitions. Initially, the district court withheld ruling on this motion and prescribed further discovery limited to the question of whether the facts of this case could be brought within *Goldfarb v. Virginia State Bar*, 421 U.S. 733, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1974). After further discovery, the court concluded that the brokerage activity at issue neither occurs in nor substantially affects interstate commerce; accordingly, the defendants' motion to dismiss was granted. On appeal, a multi-faceted challenge is raised against the lower court dismissal. Examining the various contentions in

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1 This case was brought under the Sherman Anti-Trust Act (15 U.S.C. §§ 1 et seq.). The precise motion before the court was styled a Rule 12(b)(6) motion to dismiss for failure to state a claim which was treated as a summary judgment to the extent matters outside the pleadings were considered. See Rule 12(b), F.R.Civ.Pro. The court also stated that its ruling might be viewed as a dismissal for lack of subject matter. As we discuss *infra*, the better practice is to cast as jurisdictional any dismissals based upon a failure to establish the requisite commerce clause relationship to the challenged activity. Thus, we view the proceedings below as what the Third Circuit might call a 12(b)(1) "factual attack." *Mortensen v. First Federal Sav. & Loan Ass'n*, 549 F.2d 884, 890-891 (3d Cir. 1977). Such an evaluation challenges more than the sufficiency of the allegations; it questions the existence of the underlying jurisdictional facts. "In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist." *Id.* at 891. *See also McNutt v. General Motors Accept. Corp.*, 298 U.S. 178, 189, 56 S.Ct. 780, 80 L.Ed. 1135 (1935).

light of the particular averments of the pleadings, we agree with the lower court.

Our starting point is the recognition that jurisdiction under the Sherman Act extends to the furthest reaches of congressional power to regulate commerce. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 558-559, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944). The constitutional boundaries of congressional power vary according to the nature of the activity and regulatory scheme at issue. "There is no single concept of interstate commerce which can be applied to every federal statute regulating commerce." *McLeod v. Threlkeld*, 319 U.S. 491, 495, 63 S.Ct. 1248, 1250, 87 L.Ed. 1538 (1943). Under the Sherman Act, this vast, intractable expanse of federal jurisdiction is defined through a dual analysis. Jurisdiction is conferred if the acts complained of occur in the flow of commerce, or if these acts, though local in nature, substantially affect interstate commerce. *Battle v. Liberty Nat'l Life Ins. Co.*, 493 F.2d 39, 395 (5th Cir. 1974), cert. denied, 419 U.S. 1110, 95 S.Ct. 784, 42 L.Ed.2d 807 (1975); *Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F.2d 732, 739 n. 3 (9th Cir.), *cert. denied*, 348 U.S. 817, 75 S.Ct. 29, 99 L.Ed. 645 (1954). With the "in commerce" test, the impact on interstate commerce is judged according to a qualitative standard — even insubstantial activity placed directly in the flow of commerce satisfies the jurisdictional requisite. *Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co.*, 364 U.S. 656, 81 S.Ct. 365, 5 L.Ed.2d 358 (1961). The "effect on commerce" test, however, requires a quantitative analysis of the substantiality of the impact on interstate commerce. *Mandeville Island Farms v. United States*, 334 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328 (1948). Thus, activity imposing merely an "incidental" or "insubstantial" effect on commerce may fall beyond federal power. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 510, 60 S.Ct. 982, 84 L.Ed. 1311 (1940).

In the present case, the appellants argue that in today's world, real estate brokerage activities meet both tests of jurisdiction. We emphasize, though, that with both the "in commerce" and "effect on commerce" tests, we do not consider all of the ramifications that real estate sales have on nation-wide commerce. Instead, we must focus on the impact of the particular activities challenged in the appellants' complaint. The test is not that "the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business." *Page v. Work*, 290 F.2d 323, 330 (9th Cir.), *cert. denied*, 368 U.S. 875, 82 S.Ct. 121, 7 L.Ed.2d 76 (1961). Examining the specific acts complained of in this case, we hold that they fail to establish jurisdiction under the "in commerce" test. The complaint alleges price-fixing of fees for the defendants' services in connection with sales of residential real estate in the New Orleans area. Such activity is entirely local in character. Real property is itself the quintessential local product. Further, the only sales activity mentioned in the pleadings occurs wholly intrastate. In such circumstances lower courts have consistently held that real estate brokerage does

not fall within the flow of interstate commerce. *Marston v. Ann Arbor Property Mgt. Ass'n*, 302 F.Supp. 1276, 1279-80 (E.D.Mich. 1969), *aff'd*, 422 F.2d 836 (6th Cir. 1970); *Cotillion Club, Inc. v. Detroit Real Estate Bd.*, 303 F.Supp. 850 (E.D. Mich. 1964). Moreover, a Supreme Court decision considering real estate activities in Washington, D.C. noted, "(t)he fact that no interstate commerce is involved is not a barrier to this suit." *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485, 488, 70 S.Ct. 711, 714, 94 L.Ed. 1007 (1950). Within our circuit is the view that this dictum supports concluding that real estate brokers do not operate within the flow of commerce. *Hill v. Art Rice Realty Co.*, 66 F.R.D. 449, 454 (N.D. Ala. 1974), *aff'd*, 511 F.2d 1400 (5th Cir. 1975). In denying jurisdiction under the "in commerce" test, we emphasize the limited scope of our holding. Here we are not considering pleadings that allege price fixing in appreciable sales of realty to out-of-state buyers. That might be a different matter.[2] Instead, this complaint asserts only that some individuals victimized by the defendants are persons moving in and out of the New Orleans area, "[t]he cases uniformly hold that the mere movement of individuals from one state to another in order to utilize particular services does not transfer those services into interstate services within the meaning of the Sherman Act." (cites omitted). *Diversified*

2 Some courts have held sufficient allegations that the defendants advertised in interstate newspapers and that they sold realty to a substantial number of purchasers situated out-of-state. *See, e.g., United States v. Jack Foley Realty, Inc.*, 1977, Trade Reg.Rep. ¶ 61, 678, at 72, 790 (D.Md.1977). We suggest no view as to whether the addition of allegations like these would bring the defendants within the bounds of the Sherman Act.

Brokerage Services, Inc. v. Greater Des Moines Bd. of Realtors, 521 F.2d 1343, 1346 (8th Cir. 1975).

The more compelling jurisdictional argument advanced by the appellants is their contention that the controverted brokerage activities substantially affect interstate commerce. This question has spawned a significant conflict of authority. Cases finding an interstate commerce nexus include *United States v. Atlanta Real Estate Bd.* 1972 Trade Reg.Rep. ¶ 73, 825 (N.D.Ga. 1971); *Knowles v. Tuscaloosa Bd. of Realtors*, No. 75-P-591 (N.D.Ala.) (unreported); *Wiles v. Tampa Bd. of Realty, Inc.*, No. 74-136 Cir. T-K (M.D.Fla.) (unreported); *United States v. Jack Foley Realty, Inc.*, (1977) Trade Reg.Rep. (D.Md. 1977); *Gateway Assoc. Inc. v. Essex-Costello, Inc.*, 380 F.Supp. 1089, 1094 (N.D.Ill. 1974); *Mazur v. Behrens*, (1974-1) Trade Reg.Rep. ¶ 75, 070 (N.D.Ill. 1972).[3] Among the decisions rejecting the sufficiency of the interstate commerce element are *Manion v. Jefferson Bd. of Realtors*, No. 73-2604 (E.D. La. 1974), *aff'd*, No. 74-1901 (5th Cir. 1975); *Income Realty & Mortgage, Inc. v. Denver Bd. of Realtors*, No. 77-2051, 578 F.2d 1326 (10th Cir. 1978) (opinion emphasized no *per se* restraint involved); *Bryan v. Stillwater Bd. of Realtors*, No. 77-1111, 578 F.2d 1319 (10th Cir. 1977); *Martson v. Ann Arbor Property Mgt. Ass'n*, 302 F.Supp. 1276 (E.D. Mich. 1969) *aff'd*, 422 F.2d 836

3 *See also Sapp v. Jacobs*, 408 F.Supp. 119 (S.D.Ill.), rev'd, 547 F.2d 1170 (7th Cir. 1977); *Oglesby & Barclift, Inc. v. Metro MLS, Inc.*, CCH Trade Cases ¶ 61, 064 (E.D.Va.1976); *United States v. Metro MLS, Inc.*, CCH Trade Cases, ¶ 75, 311 (E.D.Va.1973). The appellants also cite various consent decrees involving real estate brokerage activities and the Sherman Act. E.g., *United States v. Long Island Bd. of Realtors, Inc.*, CCH Trade Cases, ¶ 74, 068 (E.D.N.Y.1972).

(6th Cir. 1970); *Cotillion Club, Inc. v. Detroit Real Estate Bd.*, 303 F.Supp. 850 (E.D.Mich. 1964). *Cf. Hill v. Art Rice Realty*, 66 F.R.D. 449, 511 (N.D.Ala. 1974), *aff'd* 511 F.2d 1400 (5th Cir. 1975) (defendants' position had strong support). These diverse conclusions result in part from the varying factual gradations alleged. Instead of claiming to neatly reconcile these decisions though, we return to our polestar for analysis — the specific allegations of the complaint in this case. One paragraph says that many of the defendants' customers are "persons moving into and out of the Greater New Orleans area." For the same reason that such movement does not thrust intrastate activity "in commerce," courts have held that the passage of people across state lines to procure services does not mean that those services have a substantial effect on interstate commerce. *E.g.*, *Cotillion Club, Inc. v. Detroit Real Estate Bd., supra.*[4]

The second and primary averment is that the defendants participate in securing home financing and title insurance "obtained from sources outside the State of Louisiana." Armed principally with this allegation, the appellants advance three arguments to overcome the district court's dismissal of their action. First, they contend that allegations of *per se* violations, such as price fixing, give rise to a presumption of a substantial effect on commerce. Next, appellants argue that even

4 The interstate travel of customers is generally viewed as generating only "remote" or "incidental" consequences to interstate commerce; this movement of people evidently does not itself constitute a substantial source of interstate commerce. *Lieberthal v. North Country Lanes, Inc.*, 332 F.2d 269, 271-272 (2d Cir. 1964).

without the benefit of this presumption, the facts and allegations of the present case are controlled by the Supreme Court's decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975). Finally, they urge that even if presently established facts are insufficient, they are entitled to a trial on the merits to more fully explore their jurisdictional allegations. With all three contentions, we must disagree.

Initially, we reject the argument that an allegation of a *per se* violation creates presumptive federal jurisdiction. As the lower court correctly observed, the *per se* rule bears solely on the merits of a claim by conclusively establishing the unreasonableness of a particular restraint. This principle does not eliminate the need for a jurisdictional determination of whether a restraint sufficiently impacts on commerce that is interstate. Supreme Court decisions have never said that a *per se* allegation reduces jurisdictional requisites. On the contrary, the Court has analyzed jurisdiction without differentiating between *per se* and rule of reason allegations. *Compare Goldfarb v. Virginia State Bar*, 421 U.S. 773, 783-785, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) *with United States v. Women's Sportswear Mfg. Ass'n*, 336 U.S. 460, 464, 69 S.Ct. 714, 93 L.Ed. 805 (1949).[5]

5 The genesis of the appellants' argument of presumptive jurisdiction probably lies in the theory's advocacy by Professor Areeda. *See* P. Areeda, Antitrust Analysis 122 (2d ed. 1974). Citing Professor Areeda, the Seventh Circuit enunciated a far reduced jurisdictional threshold for *per se* cases in an alternative holding in *United States v. Finis P. Ernest, Inc.*, 509 F.2d 1256, 1260 (7th Cir.), cert. denied sub nom. *Modern Asphalt Paving & Const. Co. v. United States*,

In asserting that *per se* cases carry built-in jurisdiction, the appellants point to the seemingly abbreviated commerce clause analysis in *Burke v. Ford*, 389 U.S. 320, 88 S.Ct. 443, 19 L.Ed.2d 554 (1967). The facts of that

423 U.S. 874, 96 S.Ct. 142, 46 L.Ed.2d 105 (1975); cert. denied, 423 U.S. 893, 96 S.Ct. 191, 46 L.Ed.2d 124 (1975) (separate appeals). Nonetheless, the opinion in *Finis P. Ernest* did require some interstate commerce, although the remodelled threshold was not clearly explicated. *See also Income Realty & Mortgage, Inc. v. Denver Bd. of Realtors*, No. 77-2051, 578 F.2d 1326 (10 Cir. 1978) (Logan, J., concurring in part, dissenting in part). *But see Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F.2d 732 (9th Cir. 1954). "[W]hen the 'affect' on commerce theory is presented, it is clearly a question of fact whether wholly intrastate activities affect interstate commerce in a manner proscribed by the Sherman Act. After this question is decided, then the per se doctrine may well apply." *Id.* at 748.

Compounding our conviction that the Supreme Court does not differentiate *per se* cases are two other concerns. As a matter of analysis, we perceive no jurisdictional basis for distinguishing *per se* and rule of reason allegations. In neither case can one presume that anticompetitive activity is underway. For example, the claim of a conspiracy, the central underpinning of a price-fix, may evaporate before hard evidence adduced at trial. Conversely, in both cases, if sufficiently stated allegations are proven, the disruption of free market forces will be established. Whether that disruption is effected by price fixing or unreasonable vertical territorial restraints, the ultimate consequences on the market are similar: supply will be constricted and prices artifically inflated. Thus the final impacts of restraints of trade would be inseparable in their ultimate effect on commerce.

Our second difficulty with a presumptive jurisdiction for *per se* cases is a practical one. To say the least, it can be difficult to ascertain whether particular allegations are classified under *per se* or rule of reason restraints. *See White Motor Co. v. United States*, 372 U.S. 253, 83 S.Ct. 696, 9 L.Ed.2d 738 (1963) (vertical restrictions not *per se*); *but see United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967) (vertical restraints are *per se*); *but see again Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977) (vertical restraints are not *per se*). The often elusive boundary separating the substantive analyses of *per se* and rule of reason restraints does not command a drastic jurisdictional differentiation.

case, however, do not suggest a *per se* short-cut through jurisdiction. Instead, the opinion follows a jurisdictional methodology reflected in such Supreme Court decisions as *Goldfarb v. Virginia State Bar, supra; United States v. Women's Sportswear Mfg. Ass'n*, 336 U.S. 460, 69 S.Ct. 714, 93 L.Ed. 805 (1949); *Mandeville Island Farms v. American Crystal Sugar Co.*, 344 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328 (1948); *United States v. Yellow Cab Co.*, 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947).[6] These opinions have not relied upon data showing a demonstrable and deleterious impact upon interstate commerce. Rather, the analysis entails an identification of a substantial quantity of interstate commerce and then a determination of whether the allegedly restrained activity plays a "necessary" or "integral" role in that substantial commerce. For example, in *Burke v. Ford*, the controverted interstate commerce was liquor. Because every bottle of liquor sold in Oklahoma was manufactured out-of-state, both the substantiality and the interstate character of this commerce was manifest. The next step in the analysis is to connect this substantial interstate commerce to the alleged restraints. The plaintiffs in *Burke v. Ford* asserted that the liquor wholesalers in Oklahoma had conspired to effect horizontal

6 In *United States v. Women's Sportswear Ass'n*, supra, the defendant stitching contractors were integral participants in the substantial interstate commerce in which 80% of the cloth was shipped in from out-of-state followed by 80% of the finished sportswear being marketed out of state. Similarly, in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, supra, the defendant sugar refiners were a necessary component of the interstate commerce drawing sugar beet plants from California fields and leading to their ultimate sale as finished products in nation-wide markets. Elsewhere in this opinion, we briefly discuss the facts of *Goldfarb* and *Yellow Cab Co.*

territorial divisions. Because the entire liquor traffic was distributed through the wholesaler defendants, the alleged restraint operated in an activity that was clearly a "necessary" and "integral" part of interstate commerce. Thus, *Burke v. Ford* comports with a firmly entrenched mechanism for jurisdictional analysis and in no way imparts a reduced threshold for *per se* cases.

Rejecting the contention that *per se* allegations provide automatic jurisdiction, we turn to appellants' claim that this case is controlled by *Goldfarb v. Virginia State Bar, supra.* Underlying the Supreme Court's determination of jurisdiction in *Goldfarb* was the two-fold analysis that identifies substantial interstate commerce, then ascertains whether the allegedly restrained activity is "integral" or "necessary" to that commerce. In *Goldfarb,* the commerce was the interstate business of title insurance and home financing. The record shows that millions of out-of-state dollars flowed into Virginia as a consequence of these transactions; accordingly, the substantiality of this commerce was beyond question. The activity charged in *Goldfarb* was price-fixing by attorneys of their fees for title examinations. To connect the alleged restraint to the interstate commerce, the Supreme Court affirmed detailed district court findings which established

> (i)n financing realty purchases lenders require, 'as a condition of making the loan, that the title to the property involved be examined . . . . Thus a title examination is an integral part of an interstate transaction . . . .'

421 U.S. at 784, 95 S.Ct. at 2011, *quoting* 355 F.Supp. at 494. By statute, title examinations could be performed only by attorneys. Therefore, the alleged price-fixing of fees for this service operated on an activity that was "integral" to interstate transactions of home financing and title insurance:

> Given the substantial volume of commerce involved, and the *inseparability* of this particular legal service from the *interstate aspects* of real estate transactions, we conclude that interstate commerce has been sufficiently affected.

421 U.S. at 785, 95 S.Ct. at 2012 (emphasis added, cites omitted).

The lower court in the present case distinguished *Goldfarb* by finding that real estate brokerage constituted an incidental rather than integral part of the interstate commerce of title insurance and realty financing. Through ample discovery, the lower court heard essentially uncontradicted evidence that the brokerage function terminates when a home buyer and seller are brought together. This activity does not extend to the procurement of financing or title insurance. With respect to these latter transactions, the district court found that brokers occupy no more than an incidental, informational role. Therefore, unlike the attorneys in *Goldfarb* whose participation in title insurance was statutorily mandated, real estate brokers are neither necessary nor integral participants in the "interstate aspects" of realty financing and insurance.

This dichotomy between incidental and integral functions is based upon *United States v. Yellow Cab Co.*, 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947).[7] In *Yellow Cab*, the Supreme Court considered the relation of interstate commerce to two different cab operations. One service operated exclusively between rail terminals in Chicago carrying people from one station to the next to continue their interstate journeys. This taxi activity, and the trade restraint acting upon it, were held to be within the reach of the Sherman Act. A second cab service at issue was the general transportation of people within the Chicago area. Although this latter service frequently encompassed the movement of people to and from train stations, often to commence journeys out-of-state, the Supreme Court held that the general operation of cabs did not sufficiently implicate interstate commerce. "[W]hen local taxicabs merely convey interstate train passengers between their homes and the railroad station in the normal course of their independent local service, that service is not an integral part of interstate transportation." 332 U.S. at 233, 67 S.Ct. at 1568. "In short, their relationship to interstate transit is only casual and incidental." *Id.* at 231, 67 S.Ct. at 1567. The distinction *Yellow Cab* draws between integral and incidental activities corresponds to the distinction between *Goldfarb* and the present case. Like the first cab operators in *Yellow Cab*, the attorneys in *Goldfarb* were invariable and indispensable com-

7 The enduring vitality of *Yellow Cab* has been reaffirmed in subsequent Supreme Court decisions, including *Goldfarb*, 421 U.S. at 784, n. 13, 95 S. Ct. 2004.

ponents of interstate commerce. And, as with the second cab activity in *Yellow Cab*, real estate brokerage does not inherently comprehend the interstate aspects of their business. "To the taxicab driver" or the real estate broker, "it is just another local fare." *Id.* at 232, 67 S.Ct. at 1567.

We endorse the lower court's conclusion that *Goldfarb* does not govern this case. The factual determinations underlying the holding that real estate brokerage does not substantially affect interstate commerce must be upheld unless clearly erroneous. *United States v. Oregon Medical Society*, 343 U.S. 326, 338-339, 72 S.Ct. 690, 96 L.Ed. 978 (1952). Thus, our posture contrasts with *Goldfarb* in which the Supreme Court reviewed factual determinations in support of an "integral" role for attorneys.[8] In the present case, we find substantial evidence that real estate brokers occupy no more than an "incidental" role in interstate commerce. Therefore, jurisdiction is not established through analysis of *Goldfarb*.

Rejecting the appellants' theories of *per se* jurisdiction and *Goldfarb*, we come to their claim that they are entitled to a trial on the merits to more fully develop their jurisdictional assertions. For many courts, the

8 The vital distinction is further illustrated in another antitrust context where, on analagous facts, two Supreme Court decisions diverged according to the trial court resolution of factual questions. *Compare Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610 (1939) *with Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 74 S.Ct. 257, 98 L.Ed. 273 (1954).

dazzling complexity of antitrust litigation rarely commends dismissal in advance of trial. *See, e.g., Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Ass'n,* 484 F.2d 751, 759 (7th Cir. 1973), *cert. denied,* 414 U.S. 1131, 94 S.Ct. 870, 38 L.Ed.2d 755 (1974). *See also Mortensen v. First Federal Sav. & Loan Ass'n,* 549 F.2d 884, 892-897 (3d Cir. 1977). Competing against this concern, however, is the reality that antitrust suits frequently entail enormous expense. Win, lose, or draw regarding the final outcome, the very fact of trial may result in crushing costs and hardships to the defendant. To balance both sides of the antitrust equation, this court authorizes pre-trial dismissal except "where the factual and jurisdictional issues are completely intermeshed . . ." *McBeath v. Inter-American Citizens for Decency Committee,* 374 F.2d 359, 363 (5th Cir.), *cert. denied,* 389 U.S. 896, 88 S.Ct. 216, 19 L.Ed.2d 214 (1967). If jurisdiction and the merits are inextricably bound, "the jurisdictional issues should be referred to the merits, for it is impossible to decide one without the other." *Id. See also Battle v. Liberty National Life Ins. Co.,* 493 F.2d 39, 47 (5th Cir. 1974), *cert. denied,* 419 U.S. 1110, 95 S.Ct. 784, 42 L.Ed.2d 807 (1975).[9]

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9 Technically speaking, the merits and jurisdiction could never be severed because interstate commerce is an element of both. The teaching of *Rosemound Sand & Gravel, infra,* however, is that if the issues necessarily determinative of jurisdiction can be isolated and explored through discovery, dismissal in advance of trial may be appropriate. The effective use of discovery is a crucial feature of this case. The Supreme Court has instructed that "dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hospital Bldg. Co. v. Trustees Rex Hospital,* 425 U.S. 738, 746-747, 96 S.Ct. 1848, 1853, 48 L.Ed.2d 338 (1976).

Applying this standard to the present case, we hold that pre-trial dismissal was proper. Here, the issues of jurisdiction could be readily separated from the merits. The substantiality of particular interstate commerce and the nature of the defendants' role in such commerce comprise one issue. A separate analytic concept is raised by the question of whether these defendants conspired to fix the price for their services. Confronting the discrete issue of the commerce nexus, the district court allowed the appellants months of discovery to develop their *Goldfarb* analogy, which was practically the sole jurisdictional argument proferred. The other interstate commerce theory to be derived from the pleadings, the movement of out-of-state home buyers into the New Orleans area, was correctly discarded as a matter of law. We therefore hold that it was not "impossible to decide the one without the other." In fact, the jurisdictional issue could be and was extricated from the merits, thoroughly aired in advance of trial, and correctly resolved by the district court. *Compare McBeath v. Inter-American Citizens for Decency Committee, supra, with Rosemound Sand & Gravel v. Lambert Sand & Gravel,* 469 F.2d 416 (5th Cir. 1972). Accordingly, we hold that pre-trial dismissal was warranted in this case.

With our endorsement of the district court's determination that this particular real estate activity neither occurs in nor substantially affects interstate commerce, we must ascertain the character of the adjudication to be rendered. The district court styled its judgment as a 12(b)(6) dismissal for failure to state a

claim which was treated as a summary judgment insofar as matters outside of the pleadings were considered. Additionally, though, the court said that "the motion might properly be viewed as one for dismissal for lack of subject matter jurisdiction. We hold that this latter characterization reflects the proper disposition of this case. Because the sufficiency of the commerce nexus is both a substantive element and a jurisdictional requisite for an antitrust action, there are diverse if not disparate viewpoints on the proper procedural vehicle for resolving dismissal motions. *See generally Mortensen v. First Federal Sav. & Loan Ass'n*, 549 F.2d 884, 890-897 (3d Cir. 1977). And yet, whether the vehicle is a 12(b)(6) motion on the merits or a 12(b)(1) jurisdictional attack, the analysis of interstate commerce is the same. *Hospital Bldg. Co. v. Rex Hospital Trustees*, 425 U.S. 738, 742 n. 1, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976). In *Rex Hospital*, the court utilized Rule 12(b)(6) to hold that particular allegations adequately asserted the necessary commerce nexus. In such a case, the merits are properly reached because, with the substantive law determination that interstate commerce is sufficiently implicated, the adequacy of the jurisdictional predicate is also established. A markedly different situation arises, however, in the present case as we hold that the necessary relationship to commerce is missing. Although this conclusion might be viewed as a summary dismissal on the merits of appellants' claim, it also means that we lack subject matter jurisdiction of this action. This latter determination that jurisdiction is wanting must displace any conclusion as to the sufficiency of the appellants' claim

because, where there is no jurisdiction, we do not reach the merits. *E. g., Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S.Ct. 162, 79 L.Ed. 338 (1934). "It must be fundamental that if a court is without jurisdiction of the subject matter it is without power to adjudicate and the case could be properly disposed of only by dismissal of the complaint for lack of jurisdiction." *Stewart v. United States*, 199 F.2d 517, 519 (7th Cir. 1952). Accordingly, we hold that the proper disposition of this action requires a dismissal for lack of jurisdiction. *Cf. Rosemound Sand & Gravel v. Lambert Sand & Gravel, supra.*

In conclusion, we speak to the appellants' argument that the full realization of congressional policies mandates expansive judicial construction of the commerce clause. As the appellants observe, the acceptance of commerce clause limitations is an acknowledgment that the federal government is powerless to remedy alleged wrongs. Juxtaposed against this acknowledgment, however, is the growing spirit of federalism manifested at all levels of judicial and legislative decisionmaking.[10] This momentum is fueled by the realization that state processes are available to combat the full gamut of wrong doing, often including alleged restraints of trade.

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10 "[A] state is not merely a factor in the 'shifting economic arrangements' of the private sector of the economy . . . (cite omitted) but is itself a coordinate element in the system established by the Framers for governing our Federal Union." *National League of Cities v. Usery*, 426 U.S. 833, 849, 96 S.Ct. 2465, 2473, 49 L.Ed.2d 245 (1976). A similar conviction is expressed in the Revenue Sharing Act, 31 U.S.C. § 1221 et seq. *See, e.g.*, S.Rep. No. 92-1050, 92 Cong., 2d Sess., pt. 8 (1972), 1972 U.S.Code Cong. & Admin.News at 3874, 3939.

Even in the absence of state remedy, federal power cannot be extended simply because some wrong might otherwise be uncorrected. It is axiomatic that legislative laws and policies cannot bend principles of constitutional dimensions. Thus, no matter how beneficial, the Sherman Act cannot be thrust past its commerce clause anchorage into the residual expanse of state and individual perogative. Such a limitation of federal authority, whether requiring the dismissal of an antitrust suit or the freeing of a criminal defendant, is a necessary concomitant of private freedoms. With this acceptance of the limits of judicial power, we hold that there is no jurisdiction to consider this action and therefore order the case

DISMISSED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-2423

JAMES JEFFERSON McLAIN, ET AL.,
Plaintiffs-Appellants,

versus

REAL ESTATE BOARD OF NEW ORLEANS, INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING

(December 15, 1978)

Before GEWIN, GODBOLD and MORGAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ LOUIS R. MORGAN
United States Circuit Judge